CWM, Inc.—Port Arthur *and* International Brotherhood of Electrical Workers, Local 479, AFL–CIO. Case 16–CA–15542

August 17, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On April 22, 1992, the General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent has violated Section 8(a)(5) and (1) and Section 8(d) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 16–RC–9397. (Official notice is taken of the ''record'' in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed its answer admitting in part and denying in part the allegations in the complaint.

On May 11, 1992, the General Counsel filed a Motion for Summary Judgment. On May 13, 1992, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain and to furnish information that is relevant and necessary to the Union's role as bargaining representative, but attacks the validity of the certification on the basis of its objections to the election in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). There are no factual issues regarding the Union's request for information because the information sought is presumptively relevant to collective bargaining, and because the Respondent admitted that it refused to furnish the information because it wished to seek judicial review of the Board's certification in the underlying representation proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Delaware corporation, with a place of business located at Highway 73 in Port Arthur, Texas, is engaged in the business of disposing of hazardous waste. During the 12 months preceding the issuance of the complaint, the Respondent purchased and received goods and materials valued in excess of $50,000 directly from points located outside the State of Texas. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Pursuant to a Stipulated Election Agreement, an election was held on July 3, 1991. The Employer filed objections which were dismissed as untimely by the Regional Director. Thereafter, the Employer filed a request for review of the Regional Director's dismissal and the Board, by Order dated August 27, 1991,[1] denied the Employer's request. Challenges to the ballots of five voters were determinative. A hearing was held on these challenged ballots and on August 30, 1991, the hearing officer issued his Report and Recommendation to the Board on Challenged Ballots. Thereafter, the Employer filed exceptions to this report with the Board. On February 28, 1992, the Board issued a Decision and Direction[2] in which it directed the Regional Director to open and count the ballots, prepare and serve a revised tally of ballots, and issue the appropriate certification. Following the opening of the ballots and issuance of a revised tally of ballots on March 4, 1992, the Union was certified on March 9, 1992, as the collective-bargaining representative of the employees in the following appropriate unit:

> All instrumentation/electrical technicians at the Employer's Port Arthur, Texas, facility, excluding all other employees, guards, watchmen and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

[1] The Board, former Member Cracraft and Member Devaney dissenting, denied the Employer's request for review of the Regional Director's dismissal of election objections.

[2] 306 NLRB 495 (1992).

B. *Refusal to Bargain*

Since March 18, 1992, the Union has requested the Respondent to bargain and to furnish information, and, since April 10, 1992, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after April 10, 1992, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit and to furnish the Union requested information, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement. We also shall order the Respondent to furnish the Union the information requested.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co*., 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co*., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, CWM, Inc.—Port Arthur, Port Arthur, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Brotherhood of Electrical Workers, Local 479, AFL–CIO as the exclusive bargaining representative of the employees in the bargaining unit, and refusing to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All instrumentation/electrical technicians at the Employer's Port Arthur, Texas, facility, excluding all other employees, guards, watchmen and supervisors as defined in the Act.

(b) On request, furnish the Union information that is relevant and necessary to its role as the exclusive representative of the unit employees.

(c) Post at its facility in Port Arthur, Texas, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER DEVANEY, dissenting.

Contrary to my colleagues, I would deny the General Counsel's Motion for Summary Judgment. In the underlying representation proceeding, the Regional Director dismissed the Employer's election objections as untimely under Section 102.69 of the Board's Rules and Regulations. In so doing, the Regional Director rejected the Employer's contention that its objections, which were hand-delivered to the Regional Office 8 days after the election, i.e., 1 day after the date due under the Rules, should be considered timely because a Federal holiday occurred during the first 6 days of the 7-day period for filing objections. I dissented from the Board's denial of the Employer's request for review of the Regional Director's dismissal of the objections as I would have found merit in the Employer's contention.

Accordingly, and for essentially the same reasons set forth in my dissent in *Goody's Family Clothing*, 308 NLRB No. 49 (Aug. 10, 1992), I would have considered the Employer's objections to have been timely filed. Therefore, unlike my colleagues, I would remand this proceeding for a determination of the Employer's objections on their merits.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Brotherhood of Electrical Workers, Local 479, AFL–CIO as the exclusive representative of the employees in the bargaining unit, and WE WILL NOT refuse to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All instrumentation/electrical technicians at the Employer's Port Arthur, Texas, facility, excluding all other employees, guards, watchmen and supervisors as defined in the Act.

WE WILL, on request, furnish the Union information that is relevant and necessary to its role as the exclusive representation of the unit employees.

CWM, INC.—PORT ARTHUR